Cheah Boon Tat v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO K-05-51-1995
SHAIK DAUD, SITI NORMA YAAKOB AND ABU MANSOR JJCA
6 JULY 1995

Criminal Procedure *— Jury — Entitlement to jury trial — Capital offence — Preliminary inquiry concluded — Case committed to High Court — Abolishment of jury trials — Amending Act came into effect before trial date — Whether Act retrospective — Effect of saving provision in Act — Whether preliminary inquiry considered beginning of trial — Criminal Procedure Code (FMS Cap 6) ss 147, 252, Chs XVII & XXII — Criminal Procedure Code (Amendment) Act 1995 s 39(1) & (2) — Penal Code (FMS Cap 45) ss 34 & 302*

The appellant was charged in the magistrates' court for an offence punishable under s 302 read with s 34 of the Penal Code (FMS Cap 45) ('the Code'). Pursuant to Ch XVII of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the magistrate held a preliminary inquiry, at the end of which the magistrate committed the appellant on 24 April 1994, to stand trial in the High Court. The mode of trying the appellant's offence was set out in the CPC, ie there ought to be trial by jury. However, before the proceedings in the High Court began, the Criminal Procedure Code (Amendment) Act 1995 ('the Act'), which abolished trials by jury, came into effect on 17 February 1995 ('the effective date'). As the trial of the appellant was fixed on 24 May 1995, the High Court purported to try the case before a single judge sitting alone. Counsel for the appellant argued that the appellant was entitled to be tried by a jury as the Act was not retrospective, and furthermore, s 39 of the Act provides for a saving of cases of this nature. On the other hand, the Deputy Public Prosecutor opined that s 39 would only be applicable if the appellant's case was already part heard in the High Court on the effective date. The High Court agreed with the deputy public prosecutor and purported to begin the trial of the appellant without a jury. The appellant has appealed.

Held, allowing the appeal:

(1) Section 39(1) of the Act provides that any preliminary inquiry, trial by jury or trial with the aid of assessors that has been commenced before or on the effective date, shall be continued as if the Act had not been passed. Subsection (2) defines the commencement of a preliminary inquiry or trial as the date when the accused appears before the relevant court and evidence has begun to be adduced.

(2) Section 39(1) and (2) are clearly saving sections, specifically meant to cater for cases in the course of hearing, which include preliminary inquiries in progress, as well as cases which had been concluded and committed to the High Court.

A (3) In a case involving a capital offence, the process of trial is a continuous one from the preliminary inquiry right up to the verdict of the jury in the High Court. They are not separate proceedings because a trial by jury in the High Court cannot be proceeded with without a preliminary inquiry having been concluded first. Therefore, evidence adduced at the preliminary inquiry is to be regarded as the evidence adduced at the beginning of the trial.

(4) In this case, the appellant was entitled to be tried by a jury since he had already been committed to the High Court before the effective date. The fact that the proceedings in the High Court did not commence earlier was no fault of his.

[Bahasa Malaysia summary

Perayu telah disabitkan di mahkamah majistret atas suatu kesalahan yang boleh dihukum di bawah s 302 dibaca dengan s 34 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut'). Mengikut Bab XVII Kanun Prosedur Jenayah (NMB Bab 6) ('KPJ'), majistret tersebut telah menjalankan suatu siasatan permulaan, dan pada akhir siasatan itu telah mengkomitkan perayu pada 24 April 1994, untuk perbicaraan di Mahkamah Tinggi. Cara untuk menjalankan perbicaraan berkenaan dengan kesalahan perayu dinyatakan dalam KPJ, iaitu perbicaraan dengan juri. Walau bagaimanapun, sebelum prosiding di Mahkamah Tinggi dimulakan, Akta Kanun Prosedur Jenayah (Pindaan) 1995 ('Akta itu') yang telah memansuhkan perbicaraan dengan juri, mula berkuatkuasa pada 17 Februari 1995 ('tarikh penguatkuasaan'). Oleh kerana perbicaraan perayu telah ditetapkan pada 24 Mei 1995, Mahkamah Tinggi kononnya telah memulakan perbicaraan kes itu oleh seorang hakim sahaja. Peguambela bagi pihak perayu menyatakan bahawa perayu berhak untuk dibicarakan oleh juri oleh kerana Akta tersebut tidak retrospektif, dan di samping itu, s 39 dapat 'menyelamatkan' kes yang bersifat sedemikian. Sebaliknya, timbalan pendakwa raya pula berpendapat bahawa s 39 hanya terpakai jika kes perayu telah mula dibicarakan di Mahkamah Tinggi. Mahkamah Tinggi bersetuju dengan apa yang dinyatakan oleh timbalan pendakwa raya dan kononnya telah memulakan perbicaraan perayu tanpa juri. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Seksyen 39 Akta itu menyatakan bahawa sebarang siasatan permulaan, perbicaraan dengan juri atau perbicaraan dengan bantuan pengapit yang dimulakan sebelum atau pada tarikh penguatkuasaan, hendaklah diteruskan seolah-olah Akta itu belum diluluskan. Seksyen kecil (2) mentafsirkan permulaan suatu siasatan permulaan perbicaraan sebagai tarikh bila tertuduh telah menghadirkan diri di hadapan mahkamah yang relevan dan keterangan mula dikemukakan.

(2) Adalah jelas bahawa s 39(1) dan (2) merupakan seksyen 'penyelamat' yang diperuntukkan secara khasnya untuk kes-kes yang sedang dibicarakan, dan termasuk siasatan permulaan yang sedang dijalankan serta kes yang telah tamat dan dikomitkan ke Mahkamah Tinggi.

(3) Dalam kes yang melibatkan kesalahan hukum bunuh, proses perbicaraan adalah bersambungan daripada siasatan permulaan sehingga keputusan diberikan oleh juri di Mahkamah Tinggi. Mereka bukan merupakan prosiding yang berasingan kerana suatu perbicaraan oleh juri di Mahkamah Tinggi tidak boleh dilangsungkan tanpa siasatan permulaan ditamatkan terlebih dahulu. Lantaran itu, keterangan yang telah dikemukakan di siasatan permulaan boleh dikira sebagai keterangan yang telah dikemukakan pada permulaan perbicaraan.

(4) Dalam kes ini, perayu adalah berhak untuk dibicarakan oleh juri oleh kerana dia telah dikomitkan ke Mahkamah Tinggi sebelum tarikh penguatkuasaan tersebut. Hakikat bahawa prosiding di Mahkamah Tinggi tidak dimulakan lebih awal bukanlah kesalahan perayu.]

Notes

For cases on jury trials, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1616–1644.

Case referred to

Savrimuthu v PP [1987] 2 MLJ 173 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 147, 252, Chs XVII, XXII

Criminal Procedure Code (Amendment) Act 1995 s 39(1), (2)

Penal Code (FMS Cap 45) ss 34, 302

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Zaitun Zawiyah bte Puteh and *Mohd Yusof bin Hj Zainal Abiden* (Deputy Public Prosecutors) for the respondent.

Cur Adv Vult

Shaik Daud JCA: The appellant was charged before the magistrate in Sungai Petani for an offence punishable under s 302 read with s 34 of the Penal Code (FMS Cap 45) ('the Code'). Pursuant to Ch XVII of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the learned magistrate proceeded to hold a preliminary inquiry and at the end of which the learned magistrate framed a charge similarly for an offence punishable under s 302 to be read with s 34 of the Code, and accordingly committed

A the appellant on 24 April 1994, to stand trial in the High Court at Alor Setar.

On 6 July 1994, the learned magistrate forwarded the records of the preliminary inquiry to the High Court at Alor Setar as well as to the deputy public prosecutor as required under s 147 of the CPC. It is pertinent to
B state at this stage that under s 252 of the CPC, a person committed for trial shall be tried in the High Court as soon as practicable.

The trial in the High Court was not fixed until almost a year later, ie on 6 April 1995. It was fixed for hearing as follows: 24, 25, 27–30 May, 4–8 and 10–15 June, and notices of the above hearing dates were accordingly
C sent to all parties.

Now, at the time the appellant was committed for trial in the High Court at Alor Setar, and at the time the record referred to under s 147 of the CPC were submitted to the High Court and to the deputy public prosecutor, the mode of trying the offence with which the appellant was charged is set out in Ch XXII of the CPC, ie he ought to have been tried
D with the aid of a jury. However, before the proceedings in the High Court began, the Criminal Procedure Code (Amendment) Act 1995 or Act A908 was passed by Parliament, and came into effect from 17 February 1995. In short, Act A908 did away with preliminary inquiries, trials by jury and trials by assessors with effect from that date. Henceforth, such trials shall
E be before a single judge sitting alone. The amendment has therefore abolished jury trials for offences of murder.

Following from this, the Alor Setar High Court purported to begin the trial of the appellant on 24 May 1995, without a jury. This immediately prompted Mr Karpal Singh, counsel for the appellant, to object on the
F ground that in the circumstances of the case, the appellant is entitled to be tried by a jury as the amendment to the CPC ought not to be construed retrospectively. He further contends that s 39 of Act A908 provides for a saving of cases of this nature. Naturally, the deputy public prosecutor disagreed and urged upon the court to proceed with the trial without a jury, as he opined that Act A908 has no application, as s 39 only applies
G to cases that were part heard on the effective date. He adds further that the trial of the appellant has not begun in the High Court and therefore, s 39 is not applicable. In view of these contrary opinions, it is therefore necessary to examine s 39 of Act A908 which provides:

> (1) Any preliminary inquiry, trial by jury or trial with the aid of assessors
H that has been commenced before or on the commencement of this Act shall be continued or concluded in all respects as if this Act had not been passed.
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> (2) For the purpose of subsection (1), any preliminary inquiry or trial has been commenced when the accused has appeared before or has been brought before the Magistrate's Court or the High Court, as the case
I may be, and evidence has begun to be adduced in the inquiry or trial.

Pursuant to this section, the Chief Registrar of the Federal Court as directed by the Chief Justice of that court, issued a 'Pekeliling Ketua Pendaftar Bil 2/1995' dated 1 May 1995 as follows:

Pekeliling Ketua Pendaftar Bil 2/1995

Siasatan Permulaan (Preliminary Enquiry) dan Perbicaraan dengan Juri/ Pengapit (Assessors)

Akta A908, berkuatkuasa pada 17 Februari 1995 telah membatalkan siasatan permulaan dan perbicaraan dengan juri/pengapit.

2. Adalah saya diarah oleh YAA Ketua Hakim Negara bahawa semua siasatan permulaan sebelum 18 Februari 1995, yang telah dimulakan di mana keterangan-keterangan *telahpun dirakamkan* hendaklah diteruskan sehingga ditamatkan.

3. Bagi kes-kes yang sedang dibicarakan di Mahkamah Tinggi dengan juri/pengapit, dan bagi kes-kes yang dikemukakan ke Mahkamah Tinggi melalui siasatan permulaan hendaklah diteruskan perbicaraannya dengan juri/pengapit sehingga tamat.

After hearing submissions from both sides, the learned judicial commissioner was of the view that in the circumstances of the case, the appellant is not entitled to be tried by a jury and accordingly dismissed the preliminary objection and ordered the appellant to be tried without jury.

At the appeal before us, the same issues were raised by Mr Karpal Singh on behalf of the appellant and senior federal counsel Puan Zaitun Zawiyah bte Puteh on behalf of the respondent. After having heard submissions from both sides on 3 July 1995, and in view of the important nature of the matter, we adjourned to deliberate and on 5 July 1995, handed down our decision.

We are of the view that unlike Singapore which also abolished jury trials, our amending Act A908 specifically provided a saving clause for transitional cases, in s 39 of the Act.

On our reading of this section, it seems clear to us that ss 39(1) and (2) are just that, ie saving sections. They are specifically meant to cater for cases in the course of hearing. In the circumstances of the present case there is, therefore, no need to look anywhere else for the answer as to whether this case ought to be tried by a jury, as the answer is in s 39 itself. Preliminary inquiries in progress are saved by s 39, a fortiori, in cases which had been concluded and committed to the High Court. As to the issue of when a trial is said to begin, the case cited, ie *Savrimuthu v PP* [1987] 2 MLJ 173, in our opinion is no authority as that case is not a case involving a preliminary inquiry and the trial of a capital offence.

In trials of this nature, the situation is different and the process of trial is one continuous one from the preliminary inquiry right up to the verdict of the jury in the High Court. They are not separate proceedings because a trial by jury in the High Court cannot be proceeded with without a preliminary inquiry having been concluded first. Therefore, this is one process and evidence adduced at the preliminary inquiry is to be reckoned as the beginning of the trial. In the light of this, s 39(2) is appropriately applicable. The chief registrar's circular dated 1 May 1995, though it has no force of law, is in line with ss 39(1) and (2). Therefore, we conclude that in the circumstances of this case, the appellant herein is

A entitled to be tried by a jury as that entitlement had accrued to him way back before the amendment, since he was already committed to the High Court long before the effective date of the coming into force of the amendment. The fact that the proceedings in the High Court did not commence earlier is no fault of his. While we appreciate the desire to abolish jury trials, we are also mindful of the fact that s 39 was specifically provided to cater for cases of this nature. We are unanimously of the view that the appellant here is entitled to be tried by a jury as s 39 has in fact saved him from the amendment.

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Appeal is hereby allowed and the learned judicial commissioner's order is set aside. Case is remitted back to the High Court to be tried before a jury.

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Appeal allowed.

Reported by Isabel Liong

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